No. 226.

United States Circuit Court of Appeals.

FOR THE NINTH CIRCUIT.

NORTHERN PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

vs.

JOHN McCORMICK,
Defendant in Error.

Brief for Plaintiff in Error.

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STATEMENT OF FACTS.

This is an action brought by the plaintiff in error in the United States circuit court for the district of Montana, to recover possession of the south half of the northwest quarter; and the west half of the southwest quarter of section 21, township 13 north, of range 18 west, P. M., Montana. The issues having been made by the complaint, answer and replication, the defendant in error moved for judgment upon the pleadings. The motion was granted, and judgment entered accordingly; and the question here presented is, was this action of the circuit court, erroneous, A statement of the case requires, therefore, an examination of the pleadings.

THE COMPLAINT.—The plaintiff in error sets forth in its complaint, that it is a corporation created, organized, and existing under the act of congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast, by the northern route," and the acts and joint resolutions supplemental thereto and amendatory thereof. By the terms of this act the railroad company was authorized to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line beginning at a point on Lake Superior, thence westerly by the most eligible railroad route, as should be determined by the company, within the territory of the United States on a line north of the 45th degree of latitude, to some point on Puget Sound. By the third section of this act, congress granted to the company lands as follows:

"There be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, * * * every alternate section of public land, not mineral, designated by odd numbers to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and the plat thereof filed in the office of the commissioner of the general land office."

The sixth section of the act, among other things, provides:

"*And be it further enacted*, that the president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption, before or after they are surveyed, except by said company as provided in this act."

The complaint avers the acceptance of this act; that the general route of the railroad coterminous with the land in controversy was fixed February 21, 1872; and that the line of definite location coterminous therewith was fixed July 6, 1882; that the land in controversy is within forty miles of such line of general route and definite location, and was at said dates, "public land, to which the United States had full title not reserved, sold, granted, or otherwise appropriated, and free from preemption or other claims or rights;" and that the land is non-mineral in character; that after the location of the road the company duly constructed and completed the same, and that it was duly accepted as required by the act of congress. Such is the title deraigned in its complaint by the plaintiff, and relied upon in this action. It is then averred that the defendant in May, 1889, ousted the plaintiff from the land, and since withholds the possession of the same from the plaintiff; that the value of the land is over five thousand dollars.

Prayer is made for the restitution of the premises, and damages for its retention by the defendant.

THE AMENDED ANSWER.—The Amended answer of the defendant consists of two parts: First, the denials; second, new matter. The denials material to be considered are as follows:

"The defendant denies: That the land mentioned and described in said complaint as being the S. ½ of the N. W. ¼, W. ½ of the S. W. ¼, Sec. 21, Tp. 13 N., R. 18 W. principal Meridian of Montana, was on the 21st day of February, 1872, or any date subsequent thereto, public land to which the United States had full title.

Denies—That the land was not reserved, sold or granted, or otherwise appropriated, or that the same was free from preemption or other claims or rights.

Denies—That the land was in any other or different condition than hereinafter mentioned and described in this answer.

Denies—That the land mentioned and described in said complaint was, on the 6th day of July, 1882, public land of the United States, to which the United States had full title, and alleges:

That said land was at the said date appropriated in the manner hereinafter set forth, and was reserved and excepted from the grant to the Northern Pacific Railroad Company."

And for a further answer, and by way of new matter constituting a defense to the plaintiff's alleged cause of action, the defendant alleges:

"First—That he is a citizen of the United States over the age of twenty-one years, and during all the times herein mentioned has been duly qualified to enter the land of the United States, and to make a preemption or homestead entry under said laws.

Second—That on or about the ——— day of January, 1864, one W. B. S. Higgins, being at said time a citizen of the United States over the age of twenty-one years and duly qualified under the laws of the United States to make a pre-emption or homestead filing, entered into and upon that certain

tract, piece or parcel of land, more particularly described as being the S. ½ of the N. W. ¼, the W. ½ of the S. W. ¼ of Sec. 21, Tp. 13, N., R. 18 W., principal meridian of Montana.

Third—The said land was at said time a part of the unoccupied unappropriated, and public domain of the United States, and being at said time unsurveyed.

The said W. B. S. Higgins entered upon said tract of land for the purpose of making himself a home, and proceeded to erect improvements upon said tract of land, and to enclose a large portion thereof with a fence.

That thereafter he continued to occupy, hold and possess the same for, and during and until he sold, transferred and assigned his interest to other parties, and that through mesne conveyances, the defendant herein on or about the 6th day of January, 1881, became the owner and possessor of said tract of land.

Fourth—That said piece, parcel or tract of land was owned, held, possessed and occupied continuously between the 1st day of July, 1862, up to, and including the date of the commencement of this action by persons, who under the laws of the United States were entitled to enter the same, either as a homestead or pre-emption entry.

Fifth—That the said above described tract of land was on or about the —— day of ————, 1884, surveyed by the Surveyor-General of the State of Montana, and said survey was on or about said date accepted by the officers of the Land Department of the United States, and that on or about the 6th day of January, 1881, the defendant herein settled upon said tract of land, having become the possessor thereof by purchase from the prior occupant.

Sixth—That thereafter he applied to the officers of the United States Land Office, at Helena, Montana, (the same being the office in which the said lands were subject to entry), to file his pre-emption on said tract of land, and the plaintiff appeared by attorneys, and through its agents and attorneys,

and contested the right of the defendant to enter the same; but notwithstanding the contest on the part of the plaintiff, made by it against the defendant, herein, it was decided by the Register and Receiver of said Land Office, after a hearing and full proof had been made, concerning all facts connected therewith, that this defendant was entitled to enter said above described land, under the laws of the United States, and that the plaintiff herein had no right, title or interest therein, the said land being reserved from the grant, alleged in plaintiff's complaint herein filed.

Seventh—That said land was not owned by plaintiff by reason of the grant made to it by congress of the United States under an act approved July 2d, 1864. An act entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the Northern Route," and was on said date actually held, occupied and possessed by a duly qualified pre-emptor, under the laws of the United States.

Eighth—That after the time when the said decision had been made by the said Land Office at Helena, Montana, the said plaintiff appealed therefrom to the commissioner of the general land office, at Washington, D. C., who, upon consideration of all the facts and circumstances of the case, and the evidence produced upon the part of the said defendant, showing his title to the land, and after argument for both plaintiff and defendant showing the title to the said land, the said commissioner of the general land office, decided that the defendant herein was entitled to enter said land under the laws of the United States, from which decision of the commissioner of the general land office, the plaintiff herein appealed to the secretary of the interior, who thereafter affirmed the decision of the commissioner and decided that this defendant was entitled to hold and possess said land, under the laws of the United States, and that the plaintiff herein had no right, title, interest, claim or demand whatsoever in or to said land, or any part or parcel thereof.

Ninth: That the defendant did on the first day of May, 1889, file his declaratory statement, No. 9986, in the United States land office at Helena, Montana, for the s ½ of the nw ¼, the w ½ of the sw ¼ of Sec. 21, Tp. 13 n., R. 18 w, which declaratory statement was accepted by the register and receiver of the United States land office at Helena, Montana, aforesaid, and that thereafter, in pursuance of the act of congress approved May 27th, 1876, the defendant herein changed his pre-emption declaratory statement to Homestead Entry, No. 4890, and paid the register and receiver the necessary fees therefor.

Tenth: Defendant further alleges that on or about the first day of January, 1891, he made application to the United States land office at Helena, Montana, in the regular way, to make final proof upon said described land, and that thereafter he advertised and gave notice in a newspaper published in the County of Missoula, that he would, on the 20th day of March, 1891, make final proof upon said tract of land, in which any persons claiming to own or to hold any interest in said land were notified to appear and show cause, if any they had, why said final proof should not be made, and that on the day mentioned defendant appeared with his witnesses before the clerk of the district court of the fourth judicial district of the state of Montana, (in the absence of the judge of said court), and proved by testimony free from exceptions and in the manner and form prescribed by law, his title to said above described land, and that thereafter upon presenting said proof to the register and receiver of the United States land office at Helena, Montana, the same was accepted by them, and thereupon on the 28th day of March, 1891, the said register and receiver issued to the said defendant, a certificate under their hands, showing that this defendant was entitled to the land described herein, and he thereupon became and now is the owner thereof.

Eleventh: That at the time of making said final proof the plaintiff herein made no objection thereto, but allowed said proof to be made without protest or objection, and that said

proof, after being so accepted and approved by the said register and receiver, was by them (as affiant is informed and believes) forwarded in due course of business to the honorable commissioner of the general land office at Washington, D. C., and was by him accepted and approved, and on or about the 16th day of November, 1891, the president of the United States issued to this defendant, under his hand and the great seal of the United States, a patent for said land, and that by reason of said patent and compliance with the laws of the United States, he is now the owner and entitled to the possession of all of said tract of land without let or hindrance from said plaintiff."

PROCEEDINGS PRIOR TO FILING REPLICATION—To this amended answer the plaintiff demurred upon the ground that the same did not state facts sufficient to constitute a defense or counter-claim. This demurrer having been overruled, the plaintiff in error duly filed its replication.

REPLICATION:—The plaintiff in it replication denied the matters set up in the first, second, third, fourth and fifth paragraphs of the new matter contained in the answer, except the allegation in paragraph five, that the lands were surveyed in 1884; and further set forth in said replication as follows:

"Said plaintiff avers, that at the time of the hearing before the register and receiver of the United States district land office, for the district in which said land was situated, and at the time of the decision of the commissioner of the general land office and of the secretary of the interior, alleged in said answer, this defendant was the owner of in fee of the land described in said answer, and the said register and receiver and commissioner of the general land office and the secretary of the interior, had no jurisdiction over said land for the purpose of rendering said decision, or at all.

And that said land had not been public land of the United States, open to settlement or entry under the pre-emption, homestead or other land laws of the United States, since the first day of February, 1872."

Thereafter the defendant moved for judgment on the pleadings upon the following gounds:

"For that the said plaintiff admits the issuance of the United States patent, set forth in the said answer, and raises no material issue for trial; and for that the said patent is conclusive of all the matters sought to be presented by the replication."

Said motion was granted, and, as we have heretofore stated, judgment was entered in favor of the defendant in error. No opinion was delivered by the court showing the grounds upon which the motion was sustained; and we can only assume that the court was of the opinion that the patent issued by the United States was conclusive in this action. Whether or not such is the law is the principal question in this controversy.

ASSIGNMENT OF ERROR.

The plaintiff in error hereby assigns the following as errors committed by the United States circuit court for the district of Montana, in the determination of this case, and the entry of the judgment herein.

I.

The above court held and determined that the complaint and replication were insufficient to show the title to the S. ½ of the N. W. ¼ and the W. ½ of the S. W. ¼ of section 21, township 13 N., R. 18 west, P. M.,

Montana, had vested in the Northern Pacific Railroad Company under the act of congress approved July 2, 1864.

II.

The above court failed and refused to hold that it appeared from the pleadings herein that the S. ½ of the N. W. ¼ and the W. ½ of the S. W. ¼ of section 21, township 13 N., R. 18 west, Montana, was, except for the claim of the Northern Pacific Railroad Company thereto, public lands to which the United States had full title, nor reserved, sold, granted or otherwise appropriated, and free from preemption and other claims and rights at the date of the grant to the Northern Pacific Railroad Company, July 2, 1864, at the time the line of general route of said railroad co-terminous with said land was fixed, February 21, 1872, and at the time the line of said railroad co-terminous with said land was definitely fixed, and the plat thereof filed in the office of the commissioner of the general land office, July 6, 1882; and failed and refused to hold that the legal title vested in the said railroad company by said act of congress, attached July 6, 1882, as of date of said granting act.

III.

The above court failed to hold and determine that the facts set forth in the complaint and replication herein showed the patent for the said S. ½ of the N. W. ¼, and the W. ½ of the S. W. ¼ of section 21, township 13 north, range 18 west, Montana, issued to the

defendant by the United States, was so issued without authority of law, and is void.

IV.

The above court held that the patent issued by the United States to the said defendant on or about November 16, 1891, as in the answer herein alleged, purporting to convey to said defendant the S. ½ of the N. W. ¼, and the W. ½ of the S. W. ¼ of section 21, township 13 north, of range 18 west, Montana, was conclusive in this action that the legal title to said land had vested in the said defendant.

V.

The above court held that it did not appear from the pleadings herein that the said plaintiff was entitled to recover judgment in this action for the possession of the said S. ½ of the N. W. ¼, and the W. ½ of the S. W. ¼ of section 21, township 13, N. R. 18 W. Montana.

VI.

The above court overruled the plaintiff's demurrer to the amended answer herein.

VII.

The above court held that said defendant was entitled to judgment on the plead ings in the above action.

VIII.

The entry of judgment in favor of the said defendant and against the plaintiff.

IX.

The said court held that no replication had been filed to the answer in the above entitled cause.

ARGUMENT.

POINT I.

The Patent Issued to the Defendant is not Conclusive in this Action.

The contention of the defendant in error is, that the answer having disclosed the fact that there had been a contest between the parties hereto, before the interior department, resulting in a final decision by the secretary that the land in controversy was excluded from the grant to the Northern Pacific Railroad Company and the subsequent issuance of a patent by the United States to the defendant, and the replication not denying these averments; the pleadings show a decision as to the rights of the respective parties, by a duly authorized tribunal, which is conclusive in this action. We must assume, in the absence of a statement of the reasons actuating him, that this was the view of the judge of the court in Montana, and to this proposition we first turn our attention.

1. IF, PREVIOUS TO THE ISSUANCE OF THE PATENT, THE UNITED STATES HAD PARTED WITH THE TITLE TO THE LAND, THE PATENT IS VOID AS AN INSTRUMENT OF CONVEYANCE; AND SUCH PREVIOUS TRANSFER MAY BE SHOWN IN AN ACTION AT LAW FOR THE PURPOSE OF DEFEATING THE TITLE ASSERTED UNDER THE PATENT, AS WELL AS IN A COURT OF EQUITY.

That the United States cannot by its patent convey land which it has already parted with, no matter with what formality the patent is issued, is a self-evident proposition. And such previous conveyance may be shown for the purpose of defeating a patent, even in an action of ejectment.

Polks Lessee v. *Wendal*, 9 Cr. 87, 99
Patterson v. *Winn*, 11 Wheat. 389, 384.
Stoddard v. *Chambers*, 2 How. 284, 317, 318.
Minton v. *Crommelin*, 18 How. 87, 88.
Best v. *Polk*, 18 Wall. 112, 117.
Morton v. *Nebraska*, 21 Wall. 660, 674-7.
Sherman v. *Buick*, 93 U. S. 209, 215-16.
Smelting Co. v. *Kemp*, 104 U. S. 636, 641, et seq.
Steel v. *Smelting Co.*, 106 U. S. 447, 452, et seq.
Wright v. *Roseberry*, 121 U S. 488, 509. et seq.
Doolan v. *Carr*, 125 U. S. 618, 624 et seq.
Iron Silver M. Co. v. *Campbell*, 135 U. S. 286, 292 et seq.

And whatever evidence is sufficient to show such previous conveyance, is admissible, even if it be parol, at least where the party attacking the patent is not a mere intruder but claims under a prior conveyance from the same source.

Railroad Company v. *Smith*, 9 Wall. 95, 99 et seq.
Morton v. *Nebraska*, 21 Wall. 660, 674-5.
Sherman v. *Buick*, 93 U. S. 209, 215-16.
Wright v. *Roseberry*, 121 U. S. 488, 509 et seq.
Doolan v. *Carr*, 125 U. S. 618, 633.

The grant to the Northern Pacific Railroad Company is a present grant of the legal title.

St. P. & P. R. R. Co. v. *N. P. R. R. Co.*, 139 U. S. 1, 5.
Deseret Salt Co. v. *Tarpey*, 142 U. S. 241, 247 et seq.
Curtney v. *U. S.*, 149 U. S. 662, 675.

It is conceded that the plaintiff definitely located the line of its road coterminous with the land in controversy July 6, 1882; that it afterwards duly constructed the road; that the land was surveyed in 1884; that the land is non-mineral; and that the patent was not issued unto the defendant until November 16, 1891. If, then, the land was free from pre-emption or other claims or rights at the date of the definite location of the railroad line opposite thereto, the legal title had passed from the United States long before the issuance of the patent; and that instrument is void as a conveyance. The defendant's contention, however, is, that the department is vested with jurisdiction to determine whether lands within the external limits of the grant were free from pre-emption or other claims or rights at the date of the definite location of plaintiff's railroad; that such determination is conclusive in an action at law; and that the patent issued to defendant is conclusive evidence of such a determination. But in the absence of a recital of such a determination upon the face of the patent, (and it is not alleged or contended that such a recital appears upon the face of the patent issued to the defendant herein,) the patent is not, as against one claiming a prior title from the same source, conclusive evidence of such determination. It is not evidence that the land was public land which the United States could

dispose of. In the case of *New Orleans* v. *United States*, 10 Pet. 662, 731, the court says:

"It would be a dangerous doctrine to consider the issuing of a grant as conclusive evidence of right in the power which issued it. On its face it is conclusive, and cannot be controverted; but if the thing granted was not in the grantor, no right passes to the grantee. A grant has been frequently issued by the United States for land which had been previously granted; and the second grant has been held to be inoperative."

In *Best* v. *Polk*, 18 Wall. 112, 117, this language is quoted with approval.

And see.

Wright v. *Roseberry*, 121 U. S. 488.

Morton v. *Nebraska*, 21 Wall. 660.

Iron Silver Mining Company v. *Campbell*, 135 U. S. 286.

Miller v. *Tobin*. (Or.) 16 Pac. Rep. 162.

The patent without more, therefore, not being conclusive evidence of a contest between the parties to this action, or of a determination by the secretary that the land in question was not free from pre-emption or other claims or rights at the date of the definite location of the road, does not preclude the plaintiff from showing in this action that the land was so free from pre-emption and other claims and rights.

POINT II.

The averments of a contest before the officers of the department do not conclusively show an adjudication by the departmen t upon the question of whether this land was free from preemption or other claims or rights at the date of the definite location of the road and estop the plaintiff from showing the contrary in this action.

While the patent is clearly insufficient to estop the plaintiff from showing by the proper evidence, under its allegation of prior title in itself, that the legal title had, in fact, passed out of the United States prior to the issuance of the patent; and is insufficient, standing alone, to establish as against the prior grantee a conclusive determination, or indeed any other determination, of a decision of the department that a claim or right had attached to the land sufficient to exclude the land from the grant, the defendant will undoubtedly contend that a sufficient showing of such contest is made in paragraphs six, seven and eight of the new matter contained in the amended answer. This contention cannot be sustained:

(*a*) The department has no jurisdiction to hear and determine contests, except between settlers on the public lands.

Gliden v. *Un. Pac. Ry. Co.*, 30 Fed. Rep. 661.

Megerle v. *Ashe* 33 Cal., 74, 83.

(*b*) The defendant relies upon the previous adjudication of the department of whether the land was free from preemption or other claims or rights. as a prior adjudication by a tribunal of competent jurisdiction, which is as evidence conclusive upon the plaintiff. With that plea he also sets forth and avers

the facts upon which he claims the land to be excepted from the grant, to-wit: that it was owned, held, occupied and possessed continuously between the first day of July, 1862, up to and including the date of the commencement of this action, by persons who, under the laws of the United States, were entitled to enter the same, either as a homestead or pre-emption. This allegation of the facts with reference to the status of this land, is fatal to a plea of a determination by the officers of the department as a conclusive adjudication upon these questions. The defendant, having himself opened inquiry into the truth of the facts relied upon, for the purpose of showing the status of the lands at the various dates of the grant, fixing of general route and filing of map of definite location, cannot be heard to object to the plaintiff pursuing such inquiries without regard to the adjudication thereon.

Megerle v. *Ashe*, 33 Cal. 74, 83 and 84.

(c) Considering the defendant's allegation of previous adjudication by the department upon the question whether the land was free from pre-emption or other claims or rights at the time of the definite location of the road, as a plea in bar the sufficiency of such pleading must be tested by the rules applicable to other pleas of judgments as a bar. Tested by such rules it is insufficient.

A plea of judgment in bar, when set up in an answer must be set out with as much particularity of detail as when set out in a special plea. A judgment to be a bar must be rendered in a previous case where

the point decided was in issue. The exact question must have been decided, and these facts must sufficiently appear from the plea itself.

Story's Eq. Pleading, Sec. 665, 780, et seq.

The answer of the defendant does not show what the question at issue was in the contest between the railroad company and this defendant before the department; the allegation is that the railroad company "contested the right of the defendant to enter" the land; but upon what grounds this contest was made are not set forth or shown. It might well have been because of lack of jurisdiction in the officers of the interior department. Neither are the facts which were decided by those officers averred. The averment of the decision is, "it was decided by the register and receiver of said land office that this defendant was entitled to enter said above described land under the laws of the United States, and that the plaintiff herein had no right, title, or interest therein; the said land being reserved from the grant alleged in plaintiff's complaint herein filed; that said land was not owned by plaintiff by reason of the grant made to it by the congress of the United States." That the commissioner of the general land office, "upon consideration of all the facts and circumstances of the case, and the evidence produced upon the part of the said defendant, showing his title to the land * * * decided that the defendant herein was entitled to enter said land under the laws of the United States"; that the secretary of the interior "affirmed the decision of the commissioner and decided that this defendant was entitled to hold and

possess said land under the laws of the United States, and that the plaintiff herein had no right, title, interest, claim or demand whatsoever in or to said land, or any part or parcel thereof." These averments are averments of final conclusions reached by the officers of the department, and are not averments of the facts which they found with reference to this land.

"The burden of proof is on those who rely on the estoppal and they must show that the matter for which the plaintiff sues has been already heard and determined." Hermann on Estoppal and Res Judicata, Sec. 1286.

And the defendant having failed to set forth and aver the facts decided by the secretary, and having failed to show that those facts were fatal to the claim of the railroad company to the land in question, has failed to plead a previous adjudication which would be conclusive upon the plaintiff in this action. We may concede, for the purposes of this argument, that the decision of the secretary upon questions of fact, properly presented before him, are conclusive; that every fact which that officer found in the contest between the railroad company and McCormick is beyond question by this plaintiff; but the conclusions of the departmental officer upon those facts are not binding and conclusive upon this court or the plaintiff.

Quinby v. *Conlan*, 104 U. S. 420.
Johnson v. *Towsley*, 13 Wall. 72, 86.
Moore v. *Robbins*, 96 U. S. 530, 535.
Steele v. *Smelting Co.*, 106 U. S. 447, 452 *et seq.*
Shepley v. *Cowan*, 91 U. S. 640.
Aiken v. *Ferry*, 6 Saw. 79.

And if the facts found by the secretary in the contest which the defendant has attempted to set forth in his answer, show that the land here in controversy was, in fact, at the date of the grant, at the time the general route of the road was fixed, and at the date of definite location, public land free from preemption or other claims or rights, the ultimate conclusion of the officer, based upon an erroneous interpretation of the law applicable to the facts, that the land was excepted from the grant and subject to entry by a qualified preemptor, would not be conclusive upon the court. And this plaintiff could, in an action of ejectment, exhibit the secretary's findings of fact for the purpose of showing that his ultimate conclusion was erroneous. It is true that in nearly every case where the patent has, under a misinterpretation of the law, been issued to the wrong party, the courts say that the remedy of the party wronged is by an action in equity to have the legal title conveyed by the patent, declared held in trust for the benefit of the party rightfully entitled thereto. But in all of the cases where this language is used, the legal title had remained in the United States until the patent was issued, and then passed by the patent to the grantee named therein. In the case at bar, however, if the land in controversy was, in fact, free from preemption or other claims or rights at the date of definite location, the patent subsequently issued upon an erroneous construction of the law, would not operate to convey the legal title to the grantee therein named, but would be void, for the reason that such legal title had previously passed out of the United States,

and the plaintiff claiming under the privy legal title could recover the land in an action of ejectment.

Van Wick v. *Knevals*, 106 U. S. 360, 370.
N. P. R. R. Co. v. *Amacker*, 1 C. C. A. 345, 353.
N. P. R. R. Co. v. *Amacker*, 46 Fed. Rep. 233, 234.
N. P. R. R. Co. v. *Cannon*, 46 Fed. Rep. 224, 228-9.
N. P. R. R. Co. v. *Cannon*, 46 Fed. Rep. 237.
Miller v. *Tobin*, (Or.) 16 Pac. Rep. 161 *et seq.*
Reed v. *Reber*, 62 Ill. 240, 242.
Dalton v. *Hamilton*, 50 Cal. 422, 424.

The defendant having failed to plead any finding of fact by the departmental officer, which would conclude this plaintiff, and, indeed, having failed to plead any finding of fact by the department, has failed to plead a conclusive determination which could be relied upon as a bar and an estoppal in this action.

Not only has the defendant failed to show any decision by the secretary or other departmental officers upon the facts involved in the contest attempted to be pleaded, but the facts which must be taken as admitted by the motion for judgment on the pleadings, conclusively show that the land in question was not excepted from the grant, and that the secretary's conclusion is founded upon a misapprehension of the law applicable to those facts. In determining the motion for judgment upon the pleadings every fact well pleaded by the plaintiff in the complaint and replication, must be assumed to be true. Among these conceded facts are, that the land in controversy was vacant, unoccupied, public land of the United States, not reserved, sold, granted, or otherwise appropriated,

and free from pre-emption or other claims or rights. at the date of the grant, the date of fixing general route, and the date of the definite location of the line of the road; and that it is non-mineral in character. This is the necessary result of the denials of the allegations of occupancy contained in the replication, and the allegation of the status of the land contained in the complaint. This being the state of the facts, it is obvious that the secretary's conclusion, which alone is alleged in the answer, is based upon an erroneous application of the law to the facts.

(*e*) The judgment of the court below recites that no replication was filed to the answer. It appears from this that the judge of that court overlooked the fact of the existence of the replication set forth on page 35 of the record, and probably was mis-led into entering the judgment by that error. The denials contained in paragraphs 1, 2, 3, 4, 5, 5a and 6 of the replication, are denials of matter which the defendant first set forth. He, having plead the facts denied in these paragraphs, cannot now object to the plaintiff entering upon an inquest into the truth of the allegations.

Paragraph 7 of the replication alleges that at the time of the hearings "this defendant was the owner in fee of the land described in said answer, and the said register and receiver and commissioner of the general land office, and the secretary of the interior had no jurisdiction over said land for the purpose of rendering said decision, or at all." If the plaintiff was, as it avers, at the time of the hearings the owner in fee of the land, the department was without juris-

diction thereover. By the acts of congress the jurisdiction of the department has not been extended beyond public lands; and the courts have so often decided that when once the title to land has passed from the United States, the land department has no further control thereover; that a mere reference to the decisions is sufficient.

Moore v. *Robbins*, 96 U. S. 530, 533.
Tubbs v. *Wilhoit*, 138 U. S. 134, 145.
United States v. *Schurz*, 102 U. S. 395.
Noble v. *The Union River Logging Co.*, 147 U. S. 165, 176.

And these objections to the jurisdiction of the department to determine the controversy set up in the answer, or to issue the patent to the defendant, is a perfect answer to the plea of final determination by the officers of the department, if it be consistent with the other admitted facts.

Hermann on Estoppel and Res Judicata, Sec. 1282.

There is nothing necessarily inconsistent between the allegation that the plaintiff was the owner of the land at the time of the alleged controversy, and an admission of the existence of the controversy itself, or the deraignment of the title under the act of July 2, 1864. It may well be that there was, prior to the controversy set forth in the defendant's answer, an adjudication and determination by the secretary of the interior that the land in question passed under the grant to the railroad company; such prior adjudication and determination could be shown under the replication, and would be a perfect reply to the defendant's plea in bar. And since it is possible for the

plaintiff under the reply to introduce evidence showing that the decisions relied upon by the defendant in bar were rendered by officers without jurisdiction to render the same, it must be admitted that the replication is sufficient and the motion for judgment upon the pleadings was erroneously allowed.

POINT III.

The amended answer does not state facts sufficient to constitute a defense and the demurrer thereto should have been sustained.

The answer denies that on February 21, 1872, the land in controversy was "not reserved, sold or granted, or otherwise appropriated, or that the same was free from pre-emption, or other claims or rights. Denies that the land was *in any other or different condition than hereinafter mentioned and described in this answer.*"

"Denies that the land mentioned and described in said complaint was, on the 6th day of July, 1882, public land of the United States, to which the United States had full title, and alleges that said land was, at the said date appropriated *in the manner hereinafter set forth.*" It is evident that the defendant by these denials confines himself to the particular appropriation and status of the land at the date of general route and definite location which his answer may further show.

Pinney v. *Fridley*, 9 Minn. 26.

Armour Bros. Banking House v. *Riley Co. Bank*, (Kans.) 1 Pac. Rep. 506.

Smith v. *C. & N. W. Ry. Co.*, 18 Wis. 23.

Jordan v. *Walker*, (Ia.) 10 N. W. Rep. 232.

Egan v. *Delaney*, 16 Cal. 88.

The particular facts thus relied on are that in 1864, the land being unsurveyed, one W. B. S. Higgins, who was qualified to enter public land under the pre-emption and homestead laws, settled upon this land for the purpose of making himself a home, and made certain improvements thereon. He continued to occupy the land for a time and then sold out to other parties. Such occupation, but by different parties, continued until 1881 when the defendant bought out the last occupant and took possession of the land; that the land was not surveyed until 1884. That it was thus continuously occupied from 1862 to the commencement of this action by persons who were qualified to enter the same as a homestead or pre-emption entry.

The defendants cannot complain if, for the purpose of the argument of this point, we assume that the facts thus averred in the answer are the facts which the secretary found in determining the contest between the railroad company and the defendant. The defendant could not rely upon an estoppel by a departmental adjudication of facts, and also upon facts in conflict with the facts determined in such departmental adjudication. That the secretary's decision did not find facts more favorable to the defendant than those he has thus alleged may, with safety, be presumed. Indeed that he could not have found facts more favorable to the defendant appears from the admitted date of the survey as 1884. Prior to that time the land was not subject to entry or filing.

And we submit as a proposition of law that the mere settlement upon this land by plaintiff's predecessor's at the date of the grant and the date of fixing

the general route of the road, assuming that there was such settlement, would not operate to attach a preemption or homestead claim to the land which would exclude it from the grant or withdrawal on general route, whatever were the qualifications of such settlers and whatever was the purpose of their settlement.

Claims under the Homestead Law.

As the homestead law stood prior to May 14, 1880, the only method of initiating a right under its provisions was by an entry in the land office. Mere occupation with the purpose, at some subsequent time, of entering the land for a homestead, gave to the party so settling, no rights.

Maddox v. *Burnham*, 156 U. S. 544, 546.

Pre-emption Claims or Rights.

(1) The settlements made and abandoned prior to the occupation of this land by the defendant, are not strengthened by his subsequent attempt to enter the land. There is no privity between such prior settlers and the defendant.

Quinby v. *Conlan*, 104 U. S. 420, 422.

(2) AUTHORITIES. That a mere settlement upon unsurveyed land by one who abandoned the land prior to survey without any attempt to attach a claim or right thereto by proceeding in the land office, will not cause land to cease to be free from pre-emption claims or rights is settled by a long line of decisions. See:

I. R. R. L. Co. v. *Adkins*, 38 Ia. 254-5.
Kitteringham v. *Blair Townlot & Land Co. (Ia.)* 35 N. W. Rep. 503.
S. P. R. R. Co. v. *Purcell*, (Cal.) 18 Pac. Rep. 887.
S. P. R. R. Co. v. *Burr*, (Cal.) 24 Pac. Rep 1032.
B. & M. R. R. Co. v. *Abink*, 14 Neb. 97.
N. P. R. R. Co. v. *Meadows*, 46 Fed Rep. 254.
Cahalan v. *McTague*, 46 Fed. Rep. 251.
Brown v. *Corson*, (Or.) 19 Pac. Rep. 67, 71.
Frisby v. *Whitney*, 9 Wall. 19.
Buxton v. *Traver*, 130 U. S. 232.
The Yosemite Valley Case, 15 Wall. 80.

In *McLaughlin* v. *Menotti*, 26 Pac. Rep. 882, the supreme court of California says:

"A pre-emption claim is a lawful claim because regularly initiated under the laws of the country * * * One who has simply entered upon a parcel of puclic land, and improved it, without complying with the laws providing for the acquisition of the title, cannot be said to be possessed of a 'lawful claim.'"

"A claimant is one having some interest in the land, which is recognized by the laws of the United States. One who has entered upon and improved a parcel of public land, without having taken a step toward the acquisition of the title, cannot be regarded as the claimant of the land. *W. P. R. R. Co.* v. *Tevis*, 41 Cal. 494."

In *K. P. Railway* v. *Dunmeyer*, 113 U. S. 629, 644, the court speaking of the grant to the Kansas Pacific Company and of the exception therefrom of lands to which other claims or rights had attached, says:

"Of all the words in the English language, this word *attach* was probably the best that could have been used. It did not mean mere settlement, residence, or cultivation of the land, but it meant a proceeding in the proper land office, by which the inchoate right to the land was initiated."

This language has been quoted by the supreme court many times since, with approval. In *Whitney* v. *Taylor*, decided April 29, 1895, it is applied to a filing under the pre-emption law.

In *Lonsdale* v. *Daniels*, 100 U. S. 116, the court says:

"A notice of claim, or declaratory statement, is indispensibly necessary to give the claimant any standing as a pre-emptor, the rule being that the settlement alone is not sufficient for that purpose."

In *Whitney* v. *Taylor*, decided April 29, 1895, the court says:

"It is also true that settlement alone without a declaratory statement creates no pre-emption right."

And the court quotes with approval *Lonsdale* v. *Daniels*, *supra*.

In *Water & Mining Co.* v. *Bugby*, 96 U. S. 165, the supreme court determined the effect of a settlement by one qualified to enter land under the pre-emption law, but who never attempted to file upon the land in the public land office, under the provisions of the grant of sections 16 and 36 to the state of California, made by the act of congress approved March 3, 1853, (10 Stat. 244.) This act, after granting sections 16 and 36 to the state, provides "that where any settlement, by the erection of a dwelling house or the cultivation of any portion of the land, shall be made upon the 16th and 36th sections, before the same shall be surveyed, ... other land shall be selected by the proper authorities of the state in lieu thereof." It will be noted that this exception is broader in terms than the exception from the Northern Pacific grant. Bugby having settled upon section

16 prior to the survey, occupied the land at the date of survey, and had thereon a dwelling house and agricultural and other improvements. He made no claim under the pre-emption laws of the United States, but after the survey purchased the land in question from the state. It being contended that Bugby's settlement excluded the land from the grant, the supreme court held:

"The settler, however, was under no obligation to assert his claim, and he having abandoned it, the title of the state became absolute as of May 19, 1866, when the surveys were completed." Page 167.

In the case at bar it is conceded that the settlers who were upon the land at the date of the grant and of the general route, like Bugby, never asserted any claim to this land under the public land laws, and, as in the Bugby case, the title passed to the railroad company.

This question, moreover, is not a new one in this court. In the case of *N. P. R. R. Co.* v. *Wright*, 54 Fed. Rep. 67, this court, speaking of an allegation that certain lands were, at the date of the definite location of the road, "public lands, to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and there were at the date no entries or filings or application to make entry or filing of any nature whatsoever for said lands in the United States district land office, in which such lands were situate, or in the office of the commissioner of the general land office, and that said lands were, upon the records of said district land offices, and of the

office of the commissioner of the general land office, free from pre-emption or other claims or rights," held:

"It is specifically alleged in the bill * * * that the lands were free from pre-emption or other claims or rights."

The allegations in the bill in the Wright case, *supra*, accurately described lands which might be occupied by qualified settlers, but for which no filing had been offered.

(3) Cognate Legislation. Turning from the decisions to the legislation of congress with reference to other land grants, we find that the claims which are deemed sufficient to exclude lands from the grants are confined to those claims which have been attached to the lands by proceedings in the proper land office.

The first act granting lands to aid in the construction of a railroad was the act of September 20, 1850, (9 Stats. 466). By this act, it was provided:

"In case it shall appear that the United States have, when the line of route of said road and branches is definitely fixed by the authority aforesaid, sold any part of any section hereby granted, or that *the right of pre-emption* has attached to the same," lieu lands shall be selected "equal to such lands as the United States had sold, or to which the right of pre-emption has attached as aforesaid."

Substantially the same language is found in every railroad land grant made prior to the passage of the Union Pacific act July 1, 1862. As, under the recent decision of the supreme court in *Whitney* v. *Taylor*, "settlement alone without a declaratory statement creates no pre-emption right," it is clear that from these grants only those lands were excluded for which the settlers had filed.

July 1, 1862, congress made the following grant to the Union and Central Pacific Railroad Companies:

"That there be, and is hereby, granted to the said company * * * every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile, on each side of said road, not sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed."

This act varies somewhat from the regular formula followed in preceding acts. It protects claims under the new homestead law, by excluding lands to which a homestead claim had attached, and uses the term "pre-emption claim" in lieu of "the right of pre-emption." The United States supreme court, however, holds that under this, as under preceding acts a claim or right sufficient to except land from the grant can be attached to the land only by a proceeding in the proper land office, and that mere settlement, residence or cultivation of the land were not sufficient.

K. P. R. R. Co. v. *Dunmeyer*, 113 U. S. 629, 644.

March 3, 1863, congress made a grant of land to aid in the construction of railroads within the State of Kansas, and provided:

"In case that it shall appear that the United States have, when the lines or route of said road or branches are definitely fixed, sold any section or any part thereof, granted as aforesaid, or that the right of preemption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever," ..... indemnity shall be selected .... "equal to such lands as the United States had sold, reserved, or otherwise appropriated, or to which the rights of preemption or homestead

settlement had attached as aforesaid." 12 Stat., 772.

Similar acts were subsequently passed to aid in the construction of other roads.

Act of March 3, 1863, 12 Stat. 797; act of May 5, 1864, 13 Stat. 64; Id. 66; act of June 25, 1864, 13 Stat. 183; act of May 13, 1864, 13 Stat. 72; act of July 1, 1864, 13 Stat. 339; act of July 4, 1866, 14 Stat. 87; act of July 23, 1866, 14 Stat. 210; act of July 25, 1866, 14 Stat. 236; act of July 26, 1866, 14 Stat. 289; act of July 28, 1866, 14 Stat. 338.

In these acts the term "settlement" is used solely in connection with the homestead entry. They do not speak of a preemption settlement. This more clearly appears from the following acts:

Act of May 12, 1864, 13 Stat. 1872; act of July 4, 1866, 14 Stat. 87; act of July 25, 1866, 14 Stat. 236; act of July 26, 1866, 14 Stat. 289.

The term "homestead settlement" includes only a settlement after entry at the land office.

A. T. & S. F. R. R. Co. v. *Mecklim*, 23 Kans. 174.
R. R. & L. W. R. R. Co. v. *Sture*, 32 Minn. 96.
Maddox v. *Burnham*, 156 U. S. 544.

And the careful restriction of this term "settlement" to the homestead settlement, where it could only mean a settlement after entry, and the avoidance of its use in connection with the term "preemption," is significant that a mere settlement without more, under the preemption laws, was not intended to be included among the exceptions.

And that this was the intention is made clear by

the use of the word "attach" requiring a proceeding in the proper land office.

Sioux City etc. Co. v. *Griffey*, 143 U. S. 40.
H. & D. R. R. Co. v. *Whitney*, 132 U. S. 357.

By the second section of the act of June 2, 1864, 13 Stat. 96, congress granted lands to aid in the construction of a railroad, and provided:

"The secretary of the interior shall cause to be surveyed and conveyed to said company, from time to time, as the road progresses, out of any public lands now belonging to the United States not sold, reserved, or otherwise disposed of, or to which a pre-emption claim or right of homestead settlement has not attached, and on which a *bona fide* settlement and improvement has not been made under cover of the title derived from the United States or from the state of Iowa."

It is clear from this act that congress did not use the term "pre-emption claim" (the term here used) as equivalent to a *bona fide* settlement. And it is held, under this act, that a settlement, occupation and improvement, without more, are not sufficient to exclude land from this grant.

Iowa R. R. L. Co. v. *Adkins*, 38 Ia. 354.

On the same day that the Northern Pacific act became a law there was enacted an amendment to the Pacific railroad's act of July 1, 1862. The fourth section of this act (13 Stats. 356) after increasing the original grant, provides:

"And any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land, or any other lawful claim, nor include any government reservation or mineral land, or the

improvements of any *bona fide* settler on any lands returned and denominated as mineral lands."

It here appears that a pre-emption claim does not include the occupation of land by a *bona fide* settler. It is evident that settlers upon unsurveyed land, such as were the predecessors of defendant, as described in the answer, were *bona fide* settlers merely, and under the Union Pacific act they could not be considered as having pre-emption claims. There is certainly nothing in the Northern Pacific act indicating an intention by congress to use the term "pre-emption claim" in a different sense in that act from what it used in this contemporaneous cognate act.

Subsequent to the passage of the Northern Pacific act, congress pursued the same policy with respect to railroad land grants as that evidenced in its preceding legislation. The grants made to the states direct, followed the formula we have noted:

"In case it shall appear that the United States have * * * sold any section, or part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever," indemnity shall be selected "equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached, as aforesaid."

Act of July 4, 1866, 14 Stat. 67; act of July 3, 1866, 14 Stat. 210; act of July 25, 1866, 14 Stat. 236; act of July 26, 1866, 14 Stat. 289; act of July 28, 1866, 14 Stat. 338.

The act of July 25, 1866, 14 Stat. 239, contains a clause

giving indemnity for land which "shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of." These are the terms used in the Northern Pacific act, but it is clear that this act, excluding lands from the grant by implication only, and excluding thus only the lands "pre-empted" does not exclude lands covered by settlement merely.

Brown v. *Carson*, (Or.) 19 Pac. Rep. 67, 72-3.

It is evident from this extended review of cognate legislation that congress has uniformly pursued the policy of not excluding lands by reason of settlement and improvement only. It evidenced this policy in an act approved the same day with the Northern Pacific act. Its subsequent legislation has been governed by the same rule. Under these circumstances only a clear showing of an intention to the contrary would justify the court in holding that congress intended to depart from this policy in the Northern Pacific act and the one or two subsequent acts like it in terms.

Morton v. *Nebraska*, 21 Wall. 669, 671.

Mining Company v. *Consolidated Mining Co.*, 102 U. S. 167.

U. S. v. *Gear*, 3 How. 130.

(4) The Act of July 2, 1864. An examination of the act of July 2, 1864, so far from clearly indicating a change in the uniform preceding policy of the United States, with reference to this matter, clearly indicates that it was not the purpose of the United States to except from the operation

of this grant land which was occupied by settlers who never sought to enter the land.

There is nothing in the granting clause of the Northern Pacific act to distinguish it from other granting acts, except in so far as it may be distinguished by the use of the term "pre-emption claim," instead of "pre-emption right;" and the substitution of the phrase "free from pre-emption or other claims or rights," for the common phrase "to which a pre-emption or homestead claim may not have attached."

A review of the land grant legislation shows that the terms "right of pre-emption," "pre-emption right," and "pre-emption claim" are employed as synonymous terms, and are used indifferently to designate the preference claim or right to purchase the land which the settler acquired by compliance with pre-emption law, and which congress desires to protect by excluding the land from the grant. Prior to 1862 the term "right of pre-emption" had been uniformly used. It had been found sufficient to protect every claim or right which congress had considered entitled to protection. The use of the term "pre-emption claim" in some of the later acts was not to remedy some defects shown by experience in the earlier acts, nor did it indicate a change in the policy of congress with reference to the nature of the interest to be protected. The contemporaneous enactment of laws, in which the original term is used unmodified, forbids such a conclusion. And the act approved June 2, 1864, 13 Stat. 95, is conclusive that congress, in these granting acts, used the terms as synonymous. This act is an amendment to the act of May 15, 1856, 11 Stat. 9, making a railroad

grant from which was excepted lands to which "the right of pre-emption had attached;" and it uses the terms "pre-emption claim" and "pre-emption right" indifferently; and both are used as synonymous with the "right of pre-emption" referred to in the original grant.

As showing the congressional use of "pre-emption claim" and "pre-emption right" as synonymous, attention may be called to the debates in congress with reference to the Union Pacific act of July 2, 1864. Section 6 of a substitute introduced in the senate provided, among other things:

"That there be, and hereby is, granted to said company, * * * every alternate section of public land, designated by odd numbers * * * to which a *pre-emption or homestead claim* may not have attached at the time the line of said road is definitely fixed; and if by reason of sale by the United States or by *pre-emption or homestead right* attaching to any such alternate section or part of a section so hereby granted * * * it shall be lawful for said company to select, locate, and receive patents for so much of the other lands * * * as will make up the quantity granted to said company."

Congressional Globe, 1st Sess. 38 Cong., p. 2328.

May 21, 1864, Senator Harlan moved to amend said section to make it read:

"But if by reason of sale by the United States, or by *pre-emption or homestead right*, attaching to any such alternate sections or part of a section so hereby granted * * * it shall, in either case, be lawful for said company to select, locate and receive patents for so much of the other public lands of the United States not sold, reserved or otherwise disposed of, and to which a *pre-emption or homestead claim* may not have attached as aforesaid. * * *"

The amendment was adopted. Congressional Globe, 1st Sess. 38 Cong., p. 2398.

The act as finally approved omitted entirely the indemnity provisions.

This use of the term "pre-emption claim," is a common one.

"A pre-emption claim may be defined to be a right or interest subsisting, under the pre-emption law, in some person, to a tract of land, which, by a further full compliance with the law, may be ripened into a perfect title."

W. P. R. R. Co. v. *Spratt*, Copp's Pub. Land Laws, 416, 417. (ed. 1875).

"And so in numerous other sections is the right of pre-emption spoken of as a *claim*. It is frequently spoken of as a *right*. It is by the law a right demandable, to be exercised under the provisions and conditions of the law."

U. S. v. *Spaulding*, (Dak.) 13 N. W. Rep. 357, 360.

"I may say further I do not think the fact of making a filing alone of an application to pre-empt land, unaccompanied by any other acts ought to be considered a pre-emption claim at all, as that term is understood in law."

N. P. R. R. Co. v. *Meadows*, 46 Fed. Rep. 254, 255.

"Claim when used as a noun and in relation to land, has, in most of the states, a signification beyond that of a mere demand—a right not reduced to enjoyment but to be enforced against another—but it is used as well to express all the rights which a person holds and enjoys in the land. Pre-emption claims, homestead claims, and mining claims are familiar instances."

Marshall v. *Shafter*, 32 Cal 177, 191.

"A pre-emption claim is a lawful claim because regularly initiated under the laws of the country."

McLaughlin v. *Menotti*, (Cal.) 26 Pac. Rep. 880, 882.

"A claimant is one having some interest in the land, which

is recognized by the laws of the United States."

W. P. R. R. Co. v. *Teris*, 41 Cal. 489, 494.

"This word (claim) is, in all legislation of congress on the subject, used in regard to a claim not yet perfected by a title from the government by way of patent."

Iron-Silver Min. Co. v. *Campbell*, *135 U. S. 286, 299.*

The interior department has never made a distinction between those grants where the term employed is "pre-emption right," and those where it is "preemption claim." For over thirty years these terms, as used in the railroad grants, have by that department been construed as synonymous. Upon that construction hundreds of cases have been decided, the title to thousands of acres depends, and it should not now be disturbed, unless clearly wrong.

"The principle that the contemporaneous construction of a statute by the executive officers of the government, whose duty it is to execute it, is entitled to great respect, and should ordinarily control the construction of the statute by the court, is so firmly imbedded in our jurisprudence, that no authorities are needed to support it."

Pennoyer v. *McConnaughy*, 140 U. S. 1, 23.
Heath v. *Wallace*, 138 U. S. 573, 582.
U. S. v. *Philbrick*, 120 U. S. 52, 59.
U. S. v. *B. & R. R. Co.*, 98 U. S. 334, 341.

The indemnity clause of the Northern Pacific grant provides:

"Whenever, prior to said time, any of said sections or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof."

The obvious purpose of this provision was to provide

indemnity for all lands (except mineral) excluded from the grant in the granting clause. And the enumeration of the various losses for which indemnity is provided, is synonymous with the enumeration of the losses in the granting clause. The excepting terms "reserved, sold, granted," are repeated in the indemnity clause. The terms "occupied by homestead settlers, or pre-empted, or otherwise disposed of," are evidently used as the equivalent of "otherwise appropriated" and not "free from pre-emption or other claims or rights," and give indemnity for all lands lost from those causes. The phrase "occupied by homestead settlers" refers, as we have seen, to the occupation by the entryman after entry and before the issuance of the patent. "Otherwise disposed of" refers to an alienation of the title to property, the assignment of it to a particular use. Of the term, "disposed," in Abbot's law dictionary it is said: "To dispose of property is to alienate it; to assign it to a use; bestow it; direct its ownership. Disposal or disposition; an act bestowing property, or directing its future ownership."

And the term employed in the indemnity clause as descriptive of the lands not "free from pre-emption claims or rights" is "pre-empted." Until, therefore, the land is "pre-empted" it is free from "pre-emption claims or rights."

The term "pre-emption" is further somewhat modified by the words "or otherwise disposed of." The use of the words "or otherwise" indicates the understanding by congress that the term "pre-empted" meant a disposition of the land; and is conclusive

that it was here used as descriptive of the attachment of such a claim to the land under the pre-emption law as would operate to take it out of the category of public lands. A mere settlement upon unsurveyed land, abandoned long prior to survey, does not constitute a disposition of the land in any sense; and does not cause it to be pre-empted.

That the term "free from pre-emption or other claims or rights" is the exact equivalent to lands "to which a pre-emption or other claim or right may not have attached" is obvious. Until a claim or right attached to the land it is free therefrom.

There is, therefore, nothing in the granting clause of the Northern Pacific act indicating a change in the uniform preceding policy of the United States.

We respectfully submit that, conceding the answer to be sufficient to show that the land in controversy was occupied by a settler qualified to enter it under the pre-emption laws at the date of the general route of the road, it does not show that a pre-emption or other claim or right had attached to the land which would operate to except it from the grant.

If the land in controversy was public land not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights at the date the general route of the road was fixed, it was not thereafter subject to pre-emption, sale or entry, except by the railroad company.

Buttz v. *N. P. R. R. Co.*, 119 U. S. 55, 72.

Denny v. *Dodson*, 32 Fed. Rep. 909.

St. P. & P. R. R. Co. v. *N. P. R. R. Co.*, 139 U. S. 1, 17.

U. S. v. *St. P. R. R. Co.*, 146 U. S. 570, 599.

The settlement by the defendant upon the land in 1881, was, therefore, the settlement of a mere tresspasser, without right and without power to acquire right, and when, July 6, 1882, the company definitely located the line of its road, the title granted attached to this land as at the date of the grant.

It is further submitted that the judgment of the court below should be reversed, and the cause remanded with instructions to sustain the plaintiff's demurrer to the amended answer.

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